CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1900.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

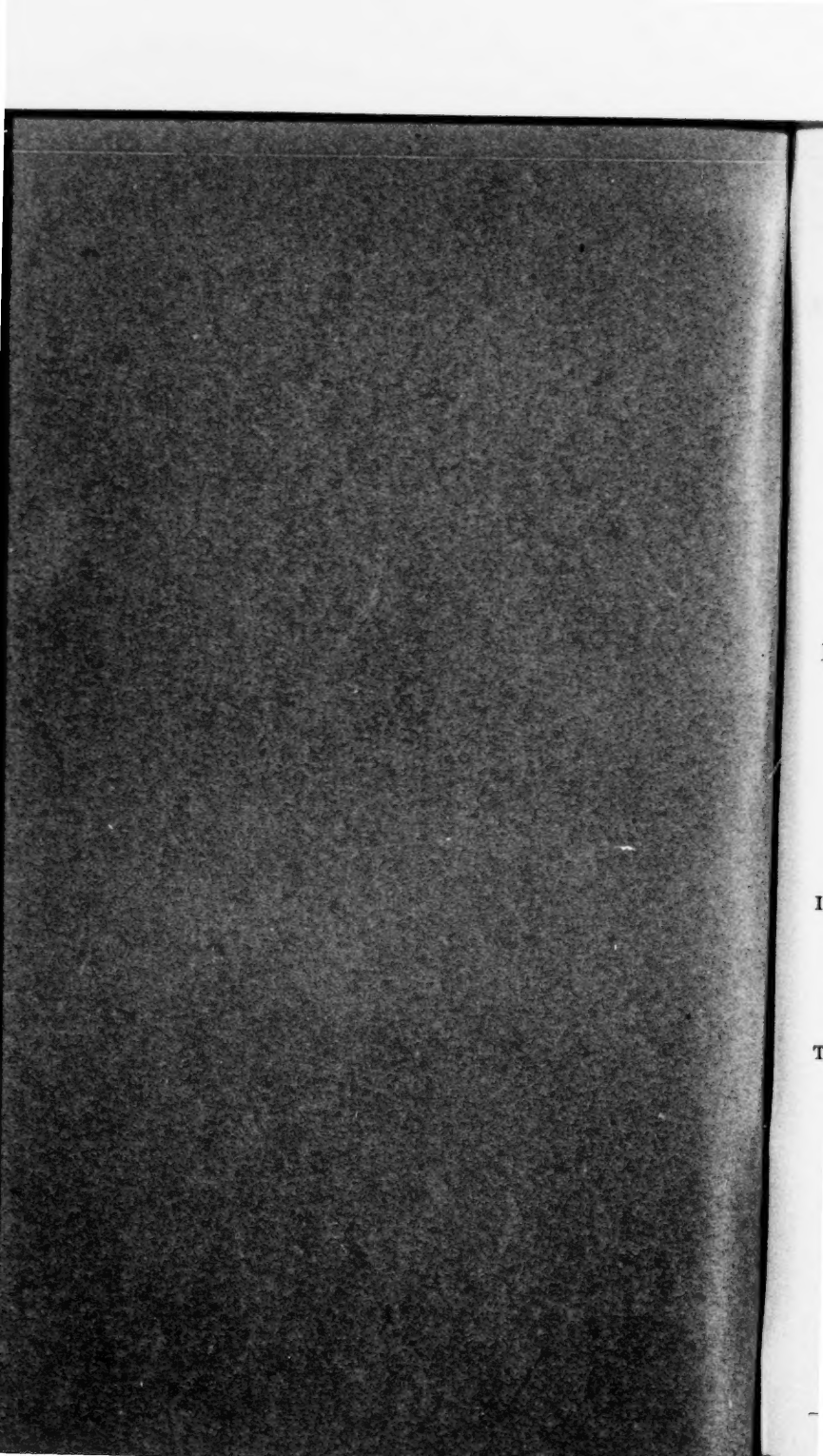
vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

FILED FEBRUARY 4, 1901.

(18,044.)



(18,044.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 44.

PETER NELSON AND HENRY NELSON, PLAINTIFFS IN ERROR,

vs.

THE NORTHERN PACIFIC RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

	Original.	Print.
Transcript from superior court of Kittitas county	1	1
Complaint	1	1
Sheriff's return on summons	3	2
Summons	4	2
Answer	5	3
Reply	6	3
Note of issue	7	4
Notice of trial	7	5
Stipulation waiving jury and agreeing to facts	8	5
Opinion	13	9
Conclusions of law	22	15
Judgment	23	15
Exceptions to conclusions of law	24	16
Notice of appeal	25	16
Appeal bond	25	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 6, 1902.

	Original.	Print
Notice of proposed statement of facts and service of same	27	18
Statement of facts	28	19
Stipulation as to facts	28	19
Judge's certificate to statement of facts	33	23
Clerk's certificate	34	23
Opinion	35	24
Judgment	43	32
Assignment of errors	44	33
Bond on writ of error	47	34
Writ of error	49	35
Clerk's certificate	51	36

1 In the Superior Court of Kittitas County, in and for the State of Wash.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Complaint.

Plaintiff complains of the above-named defendants and for cause of action against them alleges:—

I.

That the plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Washington.

II.

That plaintiff is the owner in fee, and entitled to the possession of the following-described property, to wit: The southeast quarter of section twenty-seven (27), township twenty (20), north of range fourteen (14) east of the Willamette meridian, in Kittitas county, State of Washington.

III.

That the said defendants are now unlawfully in possession of the said premises, and now unlawfully withhold the possession thereof from the plaintiff.

Wherefore plaintiff prays judgment against the said defendants, Peter Nelson and Henry Nelson; first for the recovery of the possession of the said premises; second, for its costs in this action incurred.

F. M. DUDLEY AND
CROWLEY & GROSSCUP,
Attorneys for the Plaintiff.

2 STATE OF WASHINGTON, } *ss:*
County of Kittitas, }

F. M. Dudley, being first duly sworn on oath, says: That he is an officer and agent of the plaintiff, to wit: its western land attorney; that he has read the foregoing complaint, knows the contents thereof and the same is true, as he verily believes.

F. M. DUDLEY.

Subscribed and sworn to before me this 22nd day of April, A. D. 1897.

RICHARD K. BONEY,
Notary Public for Washington, Residing at Spokane.

Filed April 28th, 1897.
E. L. EVENS,
County Clerk.
1—44

3 STATE OF WASHINGTON, } ss:
County of Kittitas, }

I, Wm. Stinson, sheriff of Kittitas county, State of Washington, do hereby certify that I received the annexed summons on the 28th day of April, 1897, and personally served the same on the 29th day of April, 1897, on Peter Nelson and Henry Nelson they being defendants named therein, by delivering to and leaving with each of said defendants personally in Kittitas county, a copy of said summons and therewith a copy of the complaint in the action named in said summons.

Dated this 1st day of May, 1897.

Sheriff's Fees.

Mileage, 90 miles	$9.00
Serving 2	1.20
Ferriage	1.00
	$11.20

WM. STINSON, *Sheriff.*
By C. S. PALMER, *Deputy.*

Filed May 3d, 1897.
E. L. EVENS,
County Clerk.

4 In the Superior Court of the State of Washington in and for the County of Kittitas, Which is Hereby Designated as the Place of the Trial of This Action.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, }
v. } Summons.
PETER NELSON and HENRY NELSON, Defendants. }

The State of Washington to Peter Nelson and Henry Nelson, the above-named defendants:

You, and each of you are hereby summoned to appear within twenty days after service of this summons upon you, exclusive of the day of such service, and defend the above-entitled action in the court aforesaid, and serve a copy of your answer or other pleading on plaintiff's attorney, whose name is subscribed to this summons, at his post-office, address below given, and in case of your failure so to do, judgment will be rendered against you, and each of you, according to the demand of the complaint, which will be filed with the clerk of the said court and a copy of which is herewith served upon you.

Dated this 26th day of April, A. D. 1897.

F. M. DUDLEY AND
CROWLEY & GROSSCUP,
Attorneys for Plaintiff.

Post-office address, Tacoma, Pierce county, Washington.

Filed May 3d, 1897.

E. L. EVENS,
County Clerk.

5 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Answer.

Comes now the defendants in the above-entitled action, Henry Nelson and Peter Nelson, and for answer to plaintiff's complaint,

1.

Deny each and all the allegations in said complaint contained.
For an affirmative defense to said complaint defendants allege,

1.

That in May, 1881, the defendant Henry Nelson, went upon the lands described in plaintiff's complaint, which were at the time unoccupied lands of the United States, that he has ever since said date held and still holds and occupies the said lands under and by virtue of the homestead laws of the United States and is entitled to continue in the peaceable possession thereof.

Wherefore, defendants pray that the prayer of plaintiff's complaint be not granted, and that defendants have and recover of and from plaintiff their costs and disbursements incurred herein.

KAUFFMAN & FROST,
Attorneys for Defendants.

STATE OF WASHINGTON, *County of Kittitas,* } *ss:*

Henry Nelson, being first duly sworn states on oath, that he is one of the defendants named in the foregoing answer, that he has read the same, knows the contents thereof and believes the same to be true.

HENRY NELSON.

Subscribed and sworn to before me this 18th day of May, 1897,
J. E. FROST,
Notary Public.

Residence Ellensburg, Wash.

Filed May 19, 1897.

E. L. EVENS,
County Clerk.

6 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Reply.

Comes now the plaintiff, Northern Pacific Railway Company, and for a reply to the affirmative defense set forth in the answer of said

defendants, Peter Nelson and Henry Nelson, denies each and every allegation of said affirmative defense and answer.

F. M. DUDLEY AND
CROWLEY & GROSSCUP,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

Thomas Cooper, being duly sworn, upon oath deposes and says, that he is the statutory agent of the Northern Pacific Railway Company, plaintiff in the above-entitled action for the State of Washington, and as such is authorized to make verification of pleadings; that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

THOMAS COOPER.

Subscribed and sworn to before me this 19th day of May, 1897.

W. L. SAHSE,
Notary Public in and for Washington,
Residing at Tacoma.

Filed May 20, 1897.

E. L. EVENS,
County Clerk.

7 STATE OF WASHINGTON, } ss:
County of Kittitas, }

In the Superior Court of the State of Washington in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* PETER NELSON and HENRY NELSON, Defendants. } Note of Issue and Notice of Trial.

To the clerk of the above-named court:

You will place the above-entitled cause on the trial docket of the above-named court, for hearing on Monday, November 1st, 1897, the same being a regular law day of said court, the day set apart by the court under and provided by the rules of the court for setting causes for trial and hearing issues of law, or as soon thereafter as counsel can be heard, upon the issues of fact raised by the pleadings therein.

The last pleading was served May 20th, 1897, the attorneys for defendant- are Messrs. Kauffman & Frost, Ellensburg, Washington.

CROWLEY & GROSSCUP AND
F. M. DUDLEY,
Attorneys for Plaintiff.

Notice of Trial of Issue of Fact.

To the above-named defendants and to Messrs. Kauffman & Frost, your attorneys:

You are hereby notified that we will, on Monday, Nov. 1st, 1897, the same being a regular law day of said court (the day provided by the rules of said court for setting causes for trial), or as soon thereafter as counsel can be heard, apply to the court in the civil department thereof, to set the above-entitled action for trial, at a time to be fixed by the court, on the issue of fact raised by the pleadings.

Spokane, Washington, October 6, 1897.

CROWLEY & GROSSCUP AND
F. M. DUDLEY,
Attorneys for Plaintiff.

Filed Oct. 28, 1897.
E. L. EVANS,
County Clerk.

8 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
v.
PETER NELSON and HENRY NELSON, Defendants. } Stipulation.

It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that the above-entitled cause shall be submitted and determined by the judge of said court, without a jury upon the following facts, which are, for the purpose of the trial of this cause, admitted and conceded to be true:

I.

That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the said Northern Pacific Railway Company, prior to the commencement of this action, succeeded to whatever right, title, claim or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein.

III.

That the N-rthern Pacific Railroad Company, is a corporation created, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

That by the third section of the said act of Congress, approved July 2, 1864, it was, among other things, provided as follows, to wit: That there be, and thereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to
9 the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections.

That by the sixth section of said act it was, among other things, enacted and provided as follows:

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company as provided in this act."

V.

That the Northern Pacific Railroad Company accepted the terms, conditions and impositions of said act within two years after the passage thereof, and signified such acceptance in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

10 VI.

That the Northern Pacific Railroad Company fixed the general route of its road extending coterminus with said land, and within forty miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office August 20th, 1873. That thereafter, to wit, November 1st, 1873, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Washington Territory, that being the district land office for the district in which said land was then situate, the following letter of instructions:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November 1st*, 1873.

Register & receiver, Walla Walla, W. T.

GENTLEMEN: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget sound to a connection with their main line near Lake Pend d'Oreille in Idaho Territory, I have caused to be prepared a diagram which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period.

The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only.

This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2nd, 1864, organizing said company.

Be pleased to acknowledge the date of the receipt of this letter.

11 Very respectfully, WILLIS DRUMMOND,
Commissioner.

That said Commissioner transmitted with said letter of instructions the diagram therein referred to, and said diagram and letter were received and filed in the said United States district land office at Walla Walla, Washington Territory, November 17, 1873..

That the land described in the complaint herein was within the forty-mile limit of the land grant as designated in said diagram.

VII.

That prior to December 6, 1884, the said Northern Pacific Railroad Company had definitely located the line of its said railroad coterminous with and within less than forty miles of the land in controversy, and December 8th, 1884, fixed said line of definite location by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and that prior to November 18th, 1886, said Northern Pacific Railroad Company constructed and completed a section of forty miles of the line of its said railroad and telegraph line extending over the said line of definite location and coterminous with the land here in controversy, and the President of the United States having appointed three commissioners to examine the same, and said commissioners having examined the said railroad and telegraph line reported on the 18th day of November, 1886, to the Hon. Secretary of the Interior that said lines were completed in all respects as required by the said act of Congress relating thereto.

That November 30, 1886, the Secretary of the Interior transmitted said report to the President of the United States with a recommendation that said railroad and telegraph line be accepted, and on the

7th day of December, 1886, the President of the United States approved such recommendation.

VIII.

That May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its certain letters patent, under the great seal of the United States, wherein and
12 whereby it purported to convey to the said Northern Pacific Railroad Company the said southeast quarter of section 27 in township 20 north of range 14 east W. M., Washington, under the terms and provisions of the said act of Congress approved July 2, 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IX.

That the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the various acts supplemental thereto and amendatory thereof.

X.

That in the year 1881 said Henry Nelson, went upon the said southeast quarter of said section 27 in township 20 north of range 14 east W. M., and occupied the same, and has since continually resided thereon.

XI.

That the said land was not surveyed by the United States until 1893.

XII.

That as soon as the said land was surveyed the said defendant Henry Nelson, attempted to enter the same under the homestead laws of the United States in the United States district land office at North Yakima, Washington. That his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to the said Northern Pacific Railroad Company.

That thereafter the decision of the register and receiver was by the Commissioner of the General Land Office, on appeal, affirmed.

XIII.

That the defendant Peter Nelson is in the occupancy of a portion of the said southeast quarter of section 27, township 20, north of range 14, east, under license from his codefendant Henry Nelson.

F. M. DUDLEY,
Attorney for Plaintiff.
KAUFFMAN & FROST AND
MIRES & WARNER,
Attorneys for Defendant-.

Filed November 15, 1897.

E. L. EVENS,
County Clerk.

13 In the Superior Court of the State of Washington, in and for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Opinion.

This is an action of ejectment.

The facts in this case have been settled by a stipulation between the parties, and show among other things, that prior to December 8th the Northern Pacific Railroad Company, the predecessor in interest to the plaintiff herein, had definitely located the line of its railroad coterminous with, and within less than forty miles of the land in controversy, and on December 8, 1884, fixed said line of definite location by filing a plat thereof, duly approved by the Secretary of the Interior in the office of the Commissioner of the General Land Office, and that prior to November 18, 1886, said company constructed and completed a section of forty miles of the line of said road and telegraph, extending over the line of said definite location and coterminous with the land in controversy in this suit. And that on the 7th day of December, 1886, the President of the United States approved and accepted said complete line of road.

On the 10th day of May, 1895, the United States executed and delivered to the Northern Pacific Railroad Company, its certain letters patent, to the lands in controversy.

It is further shown that the Northern Pacific Railroad Company fixed the gen-al route of its road extending coterminous with said land, and within forty miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office August 20, 1873. That thereafter, to wit, November 1st, 1873, the Commissioner of the General Land Office, transmitted to the register and receiver of the United States district land office at Walla Walla,
Washington Territory, that being the district land office for
14 the district in which said land was then situated, a letter of instructions, which after mentioning the fact of the company's filing its map of general route, directed said register and receiver to withhold from sale or entry all odd-numbered sections falling within the limits of the map of general route as filed not already included in the withdrawal for the main line stating that the withdrawal took effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2d, 1864, organizing said company. Defendant Henry Nelson was in the year 1881, qualified to enter public land under the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and the various acts supplemental thereto and amendatory thereof.

In the year 1881, said Henry Nelson went upon the land in controversy a portion of an odd-numbered section and occupied the same and has since continuously resided thereon.

Said land was not surveyed by the United States until 1893. As

soon as said land was surveyed by the United States, the said Henry Nelson attempted to enter the same under the homestead laws of the United States in the United States district land office at North Yakima, Washington, his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to the Northern Pacific Railroad Company, and the decision of the register and receiver was by the Commissioner of the General Land Office, on appeal, approved.

This I think contains all the material facts necessary to a decision in this suit.

The first question to be considered in this case is, to the effect of the issuance of patent for this land, by the United States, to the Northern Pacific Railroad Company. The issuance of a patent by the Government of the United States to the Northern Pacific Railroad Company for the lands earned under its grant does not, I take it, strengthen the company's title to such lands for the reason
15 that under its charter title becomes vested in the company at that moment when it has complied with all the conditions of the grant, and the issuance of a patent is but a perfunctory act on the part of the Government of the confirmation of title already acquired.

That a patent is entitled to the highest consideration by the courts, is not to be questioned. A patent bears upon its face the best evidence of title. And I conceive the rule of law to be, that a patent cannot be attacked collaterally, unless it is as a matter of law absolutely void. The Land Department of this Government has been entrusted with the disposal of the public domain, under certain statutory restrictions, and in that respect they exercise a judicial function. And it has been held in certain instances by the Supreme Court of the United States that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding; but this I believe is as far as the rule extends.

It is always competent, I believe, for the courts to review the action of the Interior Department as to the proper application of the law to the facts so found. And as there is no dispute as to the facts in this case, it is perfectly competent, I think, for this court to inquire into the lawfulness of the issuance of the patent in this case, and to fully determine the rights of the parties to this action under the issues made by the pleadings. This land in controversy being a portion of an odd-numbered section, and within the boundary lines of plaintiff's grant, from the United States, the question arises, did the defendant Henry Nelson acquire such a right to this land, under the land laws of the United States, before the line of plaintiff's road was definitely fixed as would exempt or except said tract of land from the attachment of plaintiff's grant.

The third section of the act of Congress approved July 2, 1864, relative to plaintiff's land grant, reads as follows, "That there
16 be, and hereby is, granted to the Northern Pacific Railroad Company its successors and assigns, every alternate section of

public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claim or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and whenever prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved occupied by homestead settlers or pre-empted or otherwise disposed of, other than shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

And by the sixth section of said act it was, among other things, enacted, "And be it further enacted that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed and as fast as may be required by the construction of said railroad: and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided in this act."

There is a line of decisions of the Supreme Court of the United States and of some minor United States courts that, apparently construe section six of the grant as inherently operating to withdraw the lands, within the boundary limits of the grant, from sale, entry, pre-emption, homestead, or acquisition by any means except from the company after the general route of the road is fixed. Denny *vs.* Dobson, 32 Fed. Rep., 909; St. — & P. R. R. *vs.* N. P. R. R. Co., 139 U. S. p. 18; Buttz *vs.* N. P. R. R. Co., 119 U. S., 72, and others.

17 And there are other decisions of these courts that apparently hold that independent of the fact that lands were withdrawn by virtue of the sixth section of the Northern Pacific charter, if they were withdrawn by order of the Secretary of the Interior, the effect of that order of withdrawal was to take them out of the category of public lands upon which rights could be initiated, among which cases are cited Wood *vs.* Beach, 156 U. S. 548, Hamblin *vs.* The Western Land Company, 147 U. S. 531, Spencer *vs.* McDougal, 159 U. S. 62. I have been at times somewhat at a loss to know just what rule to follow in determining these questions. One of the latest utterances of the Supreme Court of the United States on both these questions is found in a well-considered opinion by Justice Harlan in Northern Pacific Railroad Company *vs.* James G. Saunders reported in 166 U. S. p. 620, decided on April 19th, 1897. This case apparently establishes a rule somewhat different from the cases cited above. In his opinion Justice Harlan says: The company acquired by fixing its general route only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific sections until the road was definitely located

and a map thereof filed and accepted. Until such definite location, it was competent for Congress to dispose of the lands on the general route of the road, as it saw proper. Provision for the indemnification of the company in such an emergency, was made by a clause in the act of 1864, providing that whenever prior to the date of definite location "any of said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof." Again the learned justice says concerning the effect of section six of said act: "The only ground upon which a contrary view can be rested is the provision in the sixth section in the act of 1864 that the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company as provided in this act; but this section is not to
18 be construed without reference to the other sections of the act. It must be taken in connection three, which manifestly contemplated that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the Government, so that even it could not sell any of the odd-numbered sections of these lands after the general route was fixed, an interpretation wholly inadvisable, in view of the provisions of the third section. The third and sixth sections must be taken together, and so taken it must be adjudged that nothing in the sixth section prevented the Government from disposing of any lands prior to the fixing of the line of definite location." In this case Justice Harlan quotes approvingly from Kansas Pacific Railway Company *vs.* Dunmeyer, 113 U. S. 629–644 as follows: "Referring to the map of general route: We are of the opinion that the duty of filing this map as required by the act like that of definite location, is performed by filing it in the General Land Office and whatever rights accrue to the company from the act of filing it, accrue from filing it there. What are those rights? This does not, like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section of land with an odd number. * * * The act of filing this map did not withdraw this land from homestead entry." And again Justice Harlan says: "But it is said the lands are therefore to be regarded as agricultural lands that passed to the company under the act of 1864, and were preserved to it by the filing of the map of general route in 1872 and by their withdrawal in that year by the General Land Office, 'from sale or location, pre-emption or homestead entry.' This view overlooks the fact that the expressed declaration of Congress was that no public lands should pass to the company to which, at the time of the definite location of the road, the United States did not have title free from pre-
19 emption or other claims or rights." In Menotti *vs.* Dillon *et al.*, cited by plaintiff in 17 Sup. Ct. Rep. p. 951, decided

May 24th, 1897, construing a land grant somewhat similar to plaintiff's, Justice Gray uses the following language. "It is true as said in many cases, that the object of the executive order withdrawing pre-emption, private entry, and sale lands within the general route of the railroad, is to preserve the lands unincumbered until the completion and acceptance of the road. But where the grant was as here of odd-numbered sections in their certain exterior lines not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed," the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which but for such legislation would have become, in virtue of such definite location, was the property of the railroad company. And again, "The right it acquired, (meaning the railroad company), in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the exterior lines of that route, as were not sold, reserved or disposed of, or to which no pre-emptions or homestead claims had attached, at the time of the definite location of its road." In Northern Pacific Railroad Company *vs.* Musser Sauntry Co. 18 Sup. Ct. Rep. 205, decided Dec. 20th, 1897, cited by plaintiff, Justice Brewer in concluding his opinion says: "All that we here hold is that when a withdrawal of lands within an indemnity limits is made in aid of an earlier land grant and made prior to the filing of a map of definite location by a company having a latter grant, the latter having such words of exception and limitations as are found in the grant to the plaintiff, it operates to except the withdrawn lands from the scope of such latter grant." In the same opinion is the following language, "But the language is not simply free from rights, but free from claims and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public, in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road." And such is the general rule in respect to railroad land grants, and cites Railroad Company *vs.* Saunders *supra.*

After giving these cases a careful consideration, I am led to the conclusion that no public lands should pass to the Northern Pacific Railroad Company under its grant, to which, at the time of the definite location of the road, the United States did not have title free from pre-emption or other claims or rights, regardless of the time of fixing the general route of the road, and the subsequent withdrawal of lands within the limits of the grant, from the sale or entry, by the Commissioner of the General Land Office. That being what I conceive the law, the only question remaining is, did the defendant Henry Nelson, before the line of definite location of

the company's road was fixed, acquire such claim or right, to said land as between himself and the Government as would except it from the company's grant. It has been heretofore shown that the line of definite location of plaintiff's road was fixed in 1884; that the defendant Henry Nelson settled on said land in 1881, that the land in dispute was not surveyed by the United States until 1893; that the defendant Henry Nelson settled on said land in 1881 and has continuously resided thereon ever since, and immediately after said lands were surveyed by the United States, attempted to make a homestead filing thereon.

It has been often decided, and I think it is unquestionably the law, that on surveyed public lands no rights can be acquired by mere settlement and residence by a party without filing or attempting to make a filing thereon in the proper land office; as rights to public surveyed lands are not initiated and title from
21 the Government is not acquired in that way. But it seems plain to me that the rule might be different when applied to unsurveyed public lands.

By act of Congress approved May 14th, 1880, it is provided that the settler on unsurveyed lands shall have three months after the filing of township plats, to make entry, and that his rights shall relate back to the date of settlement." In this case defendant Henry Nelson, while this land was unsurveyed, and before the line of definite location of the company's road had been fixed, and after the above act of Congress had been passed and approved, accepting this assurance from the Government, settled upon this land and continuously resided thereon until said land was surveyed by the Government in 1893, a period of twelve years and then in furtherance of his evident original intention attempted to make a homestead filing thereon.

It does seem to me that the mere statement of this claim is conclusive. The above facts being conceded, I am satisfied, as between defendant and the Government, defendant could not be defeated in his attempt to acquire these lands under the homestead laws of the United States. The act referred to above was not an idle expression of Congress. It evidently was passed for a purpose, and has a meaning. And that purpose was to encourage settlement on the unsurveyed public lands and afford legal protection to the settler. It was done to prevent the working of a hardship in just such cases as the one at bar where a man spends the best years of his life acquiring a home in the wilderness. The Land Department of the Government recognizes rights thus acquired by giving a settler credit on his application for a patent, for the time he has resided on the land before it is surveyed. Believing as I do that defendant Henry Nelson acquired a claim or right to the lands in dispute within the meaning of section three of plaintiff's grant before the line of definite location of plaintiff's road was fixed, I give judgment for defendant with costs of suit.

JOHN B. DAVIDSON, *Judge.*

Filed March 22nd, 1898.

E. L. EVENS,
County Clerk.

22 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Conclusions of Law.

This cause coming on for trial before the court upon an agreed statement of facts stipulated by the plaintiff and the defendants herein and the court having examined the arguments of counsel for the defendants submitted herein, and being fully advised in the premises, as conclusions of law, from the facts so stipulated, finds:

I.

That the defendant, Henry Nelson, lawfully holds and occupies the southeast quarter of section 27, township 20 north of range 14, east of the Willamette meridian in Kittitas county, State of Washington, under and by virtue of the homestead laws of the United States, and is entitled to continue in the peaceful possession thereof, and that the plaintiff is not the owner of said lands, and its claim to the possession thereof is without right.

II.

That the defendant, Henry Nelson, is entitled to judgment awarding and continuing him in the possession of said premises, and for his costs and disbursements incurred in this action.

Dated in open court this 24th day of March, 1898.

JOHN B. DAVIDSON, *Judge.*

Filed March 25th, 1898.

E. L. EVENS,
County Clerk.

23 In the Superior Court of Kittitas County, State of Washington.

THE NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Judgment.

This cause coming on to be heard this 22nd day of March, A. D. 1898, upon the motion of Kauffman and Frost, attorneys for the defendants, for judgment in accordance with the conclusions of law, heretofore made and entered herein, and the court being fully advised in the premises grants said motion.

Now therefore, by reason of the law and the premises, it is by the court considered, ordered and adjudged that the plaintiff is not the owner, has no claim and is not entitled to the possession of the southeast quarter of section 27, township 20 north, of range 14 east, of the Willamette meridian; that the defendant, Henry Nelson is now in possession of said premises and entitled to continue in the possession thereof, under and by virtue of the homestead laws of the United States.

And it is further ordered, adjudged and decreed that the defendants recover of and from the plaintiff, The Northern Pacific Railway Company, their costs and disbursements herein, taxed at $20.00.

Dated this 24th day of March, 1898.

JOHN B. DAVIDSON, *Judge.*

Filed March 25th, 1898.

E. L. EVENS,
County Clerk.

24 In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Exceptions to Conclusions of Law.

Comes now the plaintiff herein and excepts to the conclusions of law of the court herein, numbered one, and to the whole and every part thereof, upon the ground that it is unsupported by the agreed statement of facts or any fact, and is contrary to law, the evidence and the stipulated facts.

Plaintiff further excepts to conclusions of law numbered two, and the whole and every part thereof, upon the ground that it is not supported by the agreed statement of facts, or any fact, and is contrary to law, the evidence and stipulated facts.

Plaintiff further excepts to said conclusions of law, and each of them, and the whole and every part of each of them, for the reason that they are not supported or founded upon any finding of facts or fact, and the court failed to make any finding of facts.

STOLL, STEPHENS, BUNN & McDONALD,
Attorneys for Plaintiff.

Filed March 26th, 1898.

E. L. EVENS,
County Clerk.

25 In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Notice of Appeal.

To the above-named defendants, and to Messrs. Kauffman and Frost, your attorneys:

You and each of you are hereby notified that the above-named plaintiff has appealed and does hereby appeal, to the supreme court of the State of Washington, from that certain final judgment, made and entered in the above-named superior court, in the above-entitled

action, on the 24th day of March, 1898, which said final judgment was and is in favor of defendants and against plaintiff.

STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

The service of within notice of appeal by receipt of a true copy thereof admitted this 18th day of April, 1898.

KAUFFMAN AND FROST,
Attorneys for Defendants.

Filed April 18th, 1898.

E. L. EVENS,
County Clerk.

In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants. } Appeal Bond.

Know all men by these presents, that we, the Northern Pacific Railway Company, and E. M. Shaw as surety, are held and firmly bound unto the defendants, Peter Nelson and Henry Nelson, in the sum of two hundred ($200.00), dollars for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, firmly, jointly and severally, by these presents.

The condition of the above obligation is such that, whereas
26 the above-named plaintiff has appealed to the supreme court of the State of Washington, from that certain order and final judgment, made and entered in the above-entitled action, in the above-named superior court, which is in favor of the defendants and against plaintiff, on March 24th, 1898,

Now, therefore, if the above-bounden Northern Pacific Railway Company shall and will pay all costs and damages that may be awarded against it, on the said appeal, or on the dismissal thereof, not exceeding two hundred ($200.00) dollars, then in that event, this obligation to become null and void, otherwise to remain in full force and effect.

Dated this 11th day of April, 1898.

NORTHERN PACIFIC RAILWAY COMPANY,
By STOLL, STEPHENS, BUNN & MACDONALD, *Attorneys.*
E. M. SHAW, *Surety.*

STATE OF WASHINGTON, } ss:
County of Kittitas, }

E. M. Shaw, being first duly sworn, on oath deposes and says: That he is the above-named surety, who executed the above and foregoing bond; that he is a resident of the State of Washington, and is worth the sum of two hundred ($200.00) dollars, over and

above all debts and liabilities, in property within the State of Washington, exclusive of property exempt from execution.

E. M. SHAW.

Subscribed and sworn to before me this 16th day of April, 1898.

E. T. WHITE,
Notary Public in and for the State of Washington,
Residing at Spokane, Washington.

Due service of within appeal bond by receipt of a true copy thereof admitted this 18th day of April, 1898.

KAUFFMAN & FROST,
Attorneys for Defendants.

Filed April 18th, 1898.

E. L. EVENS,
County Clerk.

27 In the Superior Court of the State of Washington for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Notice and Admission of Service.

To Peter Nelson and Henry Nelson, the above-named defendants, and to Messrs. Kauffman & Frost, your attorneys:

You are hereby notified that the above-named plaintiff has filed in the office of the clerk of the above-named court proposed statement of facts, a copy of which is herewith served upon you; which said proposed statement of facts was filed at four o'clock, p. m. on the 30th day of March, 1898.

CROWLEY & GROSSCUP,
STOLL, STEPHENS, BUNN & MACDONALD,
Attorneys for Plaintiff.

Due and regular service of the above notice and proposed statement of facts heretofore filed in the above-named court in the above-entitled action is hereby admitted, at Ellensburg, Kittitas county, State of Washington, at 4.30 o'clock p. m., on this 30th day of March, 1898.

KAUFFMAN & FROST,
Attorneys for Defendants.

Filed March 31st, 1898.

E. L. EVENS, *Clerk.*

28 In the Superior Court of the State of Washington in and for Kittitas County.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Statement of Facts.

The above-entitled action coming on regularly for hearing and trial and a jury being waived by agreement of counsel, and the cause being submitted to the court without a jury upon the agreed statement of facts which facts so agreed upon and stipulated and which are on file in the clerk's office of the above-named court in the above-entitled action were and are in words and figures as follows, to wit:

In the Superior Court of the State of Washington, Holding Terms in and for the County of Kittitas.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff,
vs.
PETER NELSON and HENRY NELSON, Defendants.
} Stipulation.

It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that the above-entitled cause shall be submitted and determined by the judge of said court without a jury upon the following facts, which are, for the purpose of the trial of this cause, admitted and conceded to be true:

I.

That the Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

II.

That the said Northern Pacific Railway Company, prior to the commencement of this action, succeeded to whatever right, title, claim or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein.

29 III.

That the Northern Pacific Railroad Company is a corporation created, organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast by the northern route" and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IV.

That by the third section of the said act of Congress, approved July 2, 1864, it was, among other things, provided as follows, to wit:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections."

That by the sixth section of said act it was, among other things, enacted and provided as follows:

"SEC. —. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption before or after they are surveyed, except by said company as provided in this act."

V.

That the Northern Pacific Railroad Company accepted the terms, conditions and impositions of said act within two years after the passage thereof, and signified such acceptance in writing under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained, and on the 29th day of December, A. D. 1864, served such acceptance on the President of the United States.

VI.

That the Northern Pacific Railroad Company fixed the general route of its road extending coterminous with said land, and within forty miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office August 20th, 1873.

That thereafter, to wit: November 1st, 1873, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Washington Territory, that being the district land office for the district in which said land was then situate, the following letter of instructions:—

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *November* 1, '73.

Register & receiver, Walla Walla, W. T.

GENTLEMEN: The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget sound to a connection with their main line near Lake Pend d'Oreille in Idaho Territory, I have caused to be prepared a diagram which is herewith transmitted showing the forty-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to $2.50 per acre subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the
31 company with the Secretary of the Interior, as required by the sixth section of the act of July 2nd, 1864, organizing said company.

Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, WILLIS DRUMMOND,
Commissioner."

That said Commissioner transmitted with said letter of instructions the diagram therein referred to, and said diagram and letter were received and filed in the said United States district land office at Walla Walla, Washington Territory, November 17th, 1873. That the land described in the complaint herein was within the forty-mile limits of the land grant as designated in said diagram.

VII.

That prior to December 8, 1884, the said Northern Pacific Railroad Company had definitely located the line of its said railroad coterminous with and within less than forty miles of the land in controversy, December 8, 1884, fixed said line of definite location by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and that prior to November 18th, 1886, said Northern Pacific Railroad Company constructed and completed a section of forty miles of the line of its said railroad and telegraph extending over the said line of definite location and coterminous with the said land here in controversy and the President of the United States having appointed three commissioners to examine the same, and said commissioners having examined said railroad and telegraph line, reported on the 18th day of Nov. 1886, to the honorable Secretary of the Interior that said lines were completed in all respects as required by the said act of Congress relating thereto. That Nov. 20, 1886, the Secretary of the Interior transmitted said report to the President of the United States with a recommendation that such railroad and telegraph line be accepted, and on the 7th day of December, 1886, the President of the United States approved such recommendation.

VIII.

That May 10th, 1895, the United States executed and de-
32 livered to the Northern Pacific Railroad Company its certain letters patent, under the great seal of the United States, wherein and whereby it purported to convey to the said Northern Pacific Railroad Company the said southeast quarter of section 27, in township 20 north, of range 14 east, W. M. Washington, under the terms and provisions of the said act of Congress approved July 2, 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

IX.

That the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of Congress approved May 20, 1862, entitled "An act of — to secure homesteads to actual settlers on the public domain" and the various acts supplemental thereto and amendatory thereof.

X.

That in the year 1881 said Henry Nelson went upon the said southeast quarter of section 27, in township 20 north of range 14 east, W. M. and occupied the same, and has since continually resided thereon.

XI.

That the said land was not surveyed by the United States until 1893.

XII.

That as soon as the said land was surveyed the said defendant Henry Nelson attempted to enter the same under the homestead laws of the United States in the United States district land office at North Yakima, Washington. That his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to the said Northern Pacific Railroad Company. That thereafter the decision of the register and receiver was, by the Commissioner of the General Land Office, on appeal, affirmed.

XIII.

33 That the defendant Peter Nelson is in the occupancy of a portion of the said southeast quarter of section 27, township 20 north, of range 14 east, under license from his codefendant Henry Nelson.

F. M. DUDLEY,
Attorneys for Plaintiff.
KAUFFMAN & FROST,
Attorneys for Defendant.

STATE OF WASHINGTON, }
County of Spokane. }

I, John B. Davidson, judge of and for the superior court in and for the county of Kittitas, State of Washington, and the judge who tried the above-entitled action, do hereby certify that the matters and proceedings embodied in the foregoing statement are matters and proceedings occurring in the foregoing-entitled action, and that the same are hereby made a part of the record therein; that the foregoing statement of facts contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein; that the foregoing statement of facts, matters and proceedings, including all the evidence and facts stipulated, heard or considered by the court, heretofore occurring in the said cause, and not already a part of the record therein.

And I further certify that the foregoing statement of facts was filed less than thirty days after the rendition and entry of judgment in the said cause; that said statement was filed before it was served; that it was served within less than thirty days after entry of judgment; that such service was made in the manner provided by law; that no amendment or amendments or exceptions thereto has been made or filed; that proof of such service has been made and filed in said action.

Done in open court this 27 day of April, 1898.

JOHN B. DAVIDSON, *Judge.*

Filed March 30th 1898.

E. L. EVENS, *Clerk.*

34 In the Superior Court of Kittitas County, State of Washington.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff, *vs.* PETER NELSON and HENRY NELSON, Defendants. } Clerk's Certificate.

STATE OF WASHINGTON, }
Kittitas County, } *ss:*

I, E. L. Evens, clerk of the Kittitas superior court, do hereby certify that the foregoing is a full, true and correct transcript of so much of the records and files in the above-entitled cause as I have been directed by the appellant to transmit to the Supreme Court.

In testimony whereof I have hereunto set my hand and the seal of said superior court this 17th day of June, A. D. 1898.

E. L. EVENS,
County Clerk and Clerk of the Superior Court of Kittitas County, Wash.

[SEAL.]

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
v.
PETER NELSON and HENRY NELSON, Respondents.

No. 3000. Filed May 31st, 1900.

This action was brought by the Northern Pacific Railway Company to recover from the defendants a certain described portion of an odd-numbered section of land situated in Kittitas county, and lying within the place limits of the grant made to the Northern Pacific Railroad Company by the act of Congress of July 2, 1864 (13 Stat. 365). The complaint is in the ordinary form, and alleges the incorporation of the plaintiff, that it is the owner in fee and entitled to the possession of the land described in the complaint, and that the defendants are now unlawfully in possession of the said premises, and unlawfully withholding possession thereof from the plaintiff, and praying judgment against the defendants for the recovery of the possession of said premises, and for costs incurred in this action. The answer of the defendants denies the allegations contained in the complaint, and avers affirmatively that in May, 1881, the defendant Henry Nelson went upon the lands described in plaintiff's complaint, which were at that time unoccupied lands of the United States; that he has ever since said date held, and still holds and occupies, the said lands under and by virtue of the homestead laws of the United States, and is entitled to continue in the peaceable possession thereof. The reply is a general denial of the affirmative matter set up in the answer. The cause was submitted to the superior court upon an agreed statement of facts, and after consideration of the facts agreed upon, and the law applicable thereto, judgment was rendered in favor of the defendants, and the plaintiff thereupon appealed to this court.

It appears from the agreed statement of facts that The Northern Pacific Railway Company, appellant here, is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and that said company, prior to the commencement of this action, succeeded to whatever right, title, claim, or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein; that the Northern Pacific Railroad Company is a corporation organized and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof; that the Northern Pacific Railroad Company accepted the terms, conditions, and impositions of said act within two years after the passage thereof, and signified such acceptance in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained and on December 29, 1864, served such acceptance on the president of the
36 United States; that the Northern Pacific Railroad Company fixed the general route of its road, extending coterminous

with said land, and within 40 miles thereof, by filing a plat of such general route in the office of the Commissioner of the General Land Office on August 20, 1873; that thereafter, and on November 1, 1873, the Commissioner of the General Land Office transmitted to the register and receiver of the United States district land office at Walla Walla, Wash. T. (that being the district land office for the district in which said land was situated), a letter of instructions, which, omitting date and address, is as follows: "The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line from Puget sound to a connection with their main line, near Lake Pend d'Oreille, in Idaho Territory, I have caused to be prepared a diagram, which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district; and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the sixth section of the act of July 2, 1864, organizing said company;" that the said diagram and letter were received and filed in the said United States district land office at Walla Walla, Wash. T., on November 17, 1873; that the land described in the complaint herein was within the 40-mile limits of the land grant as designated in said diagram; that on December 8, 1884, the said Northern Pacific Railroad Company fixed the line of definite location of its railroad by filing a plat thereof, duly approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office, and that prior to November 18, 1886, the said Northern Pacific Railroad Company constructed and completed a section of 40 miles of the line of its said railroad and telegraph, extending over the said line of definite location, and coterminous with the said land here in controversy; that the President of the United States having appointed three commissioners to examine the same, and said commissioners having examined said railroad and telegraph line, they reported on the 18th day of November, 1886, to the honorable Secretary of the Interior, that said lines were completed in all respects as required by the said act of Congress relating thereto; that on November 20, 1886, the Secretary of the Interior transmitted said report to the President of the United States, with recommendation that such railroad and telegraph line be accepted, and on the 7th day of December, 1886, the President of the United States approved such recommendation; that on May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its patent, wherein and whereby it purported to convey to said company the lands in controversy in this action, under the terms and provisions of the said act of Congress of July 2, 1864, and various acts and joint resolutions of Congress supplemental thereto and amendatory thereof; that the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of Con-

gress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and various acts supplemental thereto and amendatory thereof; that in the year 1881 said Henry Nelson went upon the lands in controversy (being the S. E. ¼ of section 27, in township 20 N., of range 14 E., W. M.), and occupied the same, and has since continually resided thereon;
37 that the said land was not surveyed by the United States until 1893; that as soon as the said land was surveyed the defendant Henry Nelson attempted to enter the same, under the homestead laws of the United States, in the United States district land office at North Yakima, Wash.; that his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to said Northern Pacific Railroad Company; that thereafter the decision of the register and receiver was by the Commissioner of the General Land Office confirmed.

It is conceded that the United States issued its patent to the Northern Pacific Railroad Company for the lands here in controversy, and it therefore follows that the legal title to the land was thereby conveyed to the company. The only question presented in this case for determination is whether the Land Department erred in its construction of the law, in issuing the patent to the railroad company; and it must be conceded that the department did err in so doing, if the land in question was open to homestead entry at the time it was settled upon and occupied by the respondent. It is shown by the agreed statement of facts, as we have seen, that the respondent went upon the land in 1881, and has ever since occupied the same, and that he offered to file a homestead application thereon immediately after the land was surveyed, and the plat thereof filed in the local land office. But it is contended by the appellant that at that time the premises were not subject to homestead entry, for the reason that the land had previously been withdrawn from sale or entry by virtue of the act of July 2, 1864 (13 Stat. 365), and the executive order of November 1, 1873; and after a careful consideration of the cases cited, and all other cases we have been able to discover bearing upon the question at issue, we are constrained to conclude that the contention of the appellant must be sustained. Section 3 of the said act of July 2, 1864, provides as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted,

sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections." By section 6 of said act it was enacted "that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

These provisions of this granting act to the Northern Pacific Railroad Company have been construed by the Supreme Court of the United States in numerous cases, and it seems to us that the question now under consideration has been settled by that tribunal. In Buttz *v.* Railroad Co., 119 U. S. 55, a settler entered upon land on October 5, 1871, with the intent of securing the same under the pre-emption laws of the United States. The land was at that time within the limits of an Indian reservation, the Indian title to which was not extinguished until June 19, 1873. On February 21, 1872, the railroad company filed its map showing the general route of the road, and on March 30, 1873, the land was withdrawn in favor of the company. On the 11th day of August, 1873, and within three months after the Government survey of the land, the pre-emption claimant presented his declaratory statement to the register and receiver of the local land office. The court in that case, referring to the act of July 2, 1864, said: "The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third (sixth) section declares that, after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall

not be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company." The court, after stating when the general route of the road may be considered as fixed, proceeded, on page 72, as follows: "When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the lands for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless. Nor is there any-
39 thing inconsistent with this view of the sixth section as to the general route in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable." In St. Paul & P. R. Co. *v.* Northern Pac. R. Co. 139 U. S. 1, both parties to the controversy claimed certain land by virtue of a congressional grant. It appeared that the land in controversy had been withdrawn by an order made by the Secretary of the Interior for the benefit of the Northern Pacific Railroad Company, and upon the subject of withdrawal the court said: "Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit on the 13th of August, 1870, preserved the lands, for the benefit of the Northern Pacific railroad, from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required for the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the comple-

tion and acceptance of the road." Then, after quoting from the opinion in the case of Buttz *v.* Railroad Co., *supra*, the court further observed: "After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration; nor, indeed, in the absence of its announcement, after the general route is fixed." The same doctrine was announced in the subsequent case of U. S. *v.* Southern Pac. R. Co., 146 U. S. 570. The court in that case expressly approved the language we have quoted from the case of Buttz *v.* Railroad Co. In Wood *v.* Beach, 156 U. S. 548, two orders of withdrawal were made by the Department of the Interior,—one in favor of the Leavenworth, Lawrence & Galveston Railroad Company; the other in favor of the Missouri, Kansas & Texas Railway Company. After these orders of withdrawal were received at the local land office, one Wood made application to enter the land as a homestead; and the court, in considering the effect of those withdrawals, used the following language: "It was said in Wolsey *v.* Chapman, 101 U. S. 755, 768: 'The proper executive department of the Government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in Riley *v.* Welles, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal.' This has been and is the settled rule of the courts and the Land Department. It is only a recognition of the limitations prescribed in the statutes; for by Rev. St. § 2258, 'lands included in any reservation by any treaty, law or proclamation of the President, for any purpose,' are expressly declared to be not subject to the rights of pre-emption, and section 2289, the one giving the right to enter for a homestead, limits that right to 'unappropriated public lands.' The fact that the withdrawals were made by order of the Interior Department, and not by proclamation of the President, is immaterial." In Railroad Co. *v.* Colburn, 164 U. S. 383, the court held that mere occupation or cultivation of premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, did not exclude the tract from the operation of the land grant, and in its opinion said that "frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office." And again it is said by the court, in Menotti *v.* Dillon, 167 U. S. 703, 721, in speaking of the effect of a withdrawal order made by the Secretary of the Interior: "That order took these lands out of the public domain, as between the railroad company and individuals, but they remained public lands, under the full control of Congress, to be disposed of by it, in its discretion, at any time before they became the

property of the company, under an accepted, definite location of its road." In Northern Pac. R. Co. *v.* Musser-Sauntry Land, Logging & Mfg. Co., 168 U. S. 604, the same question was presented to the court. In that case certain lands had been granted to the State of Wisconsin to aid in the construction of a railroad, and the same were claimed by the Northern Pacific Railroad Company as part of the grant to it, and in that case the court said: "But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864, exempted such lands from the operation of the grant to plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed.' The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. Wolcott *v.* Navigation Co., 5 Wall. 681; Wolsey *v.* Chapman, 101 U. S. 755, and cases cited in the opinion; Hamblin *v.* Land Co., 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent land grants."

41 The rule announced in the foregoing cases was adhered to in the late case of Railroad Co. *v.* Amacker, 20 Sup. Ct. 236. It was there held that homestead entries made prior to the time when notice of withdrawal of the lands is received by the local land office, although after the time when the map of the general route of the railroad was filed in the office of the Secretary of the Interior, were made valid by the act of Congress of April 21, 1876, if the entries were made in good faith by actual settlers upon tracts of not more than 160 acres each, and that they were therefore subject to the provisions of the act of June 15, 1880, authorizing the purchase of such lands by persons who have entered them, or their transferees by *bona fide* instruments in writing. The contest in that case, as stated by the court, was between one claiming under homestead entry and a company claiming under a grant in aid of a railroad; and in the course of the opinion it is said: "They (meaning a majority of the court) are of the opinion that the effect of the act of 1876 was to validate all otherwise regular pre-emption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time the map of general route was filed in the office of the Secretary of the Interior, and the order of withdrawal made; that the withdrawal authorized by the sixth section of the act making the land grant to the Northern Pacific Railway Company did not vest in

the company any title to the lands within the withdrawal limits, but only operated, by legislative declaration and subsequent executive action to withdraw those lands from homestead or pre-emption entries." This decision contains the latest expression we have seen of the Supreme Court of the United States upon the question in controversy here, and it will be perceived that it is a virtual reaffirmance of the previous rulings of the court. It is claimed, however, by the learned counsel for the respondent, that a different rule was announced in Railroad Co. *v.* Sanders, 166 U. S. 620, but we do not so understand the decision in that case. The Northern Pacific Railroad Company claimed the lands involved in that action under the grant of July 2, 1864. The company filed its map designating the general route of the road in 1872, and in 1882 filed its map indicating the definite location of its line of railroad; and prior to this latter date certain persons had made application to purchase the land, as mineral land, under the laws of the United States. At the time of the filing of the map of definite location these applications were pending and undetermined, and the court held that these applications constituted a "claim," in contemplation of the act of July 2, 1864, and that the lands so claimed as mineral lands were not included in the grant. It may be said in this connection that the said act of July 2, 1864 especially excluded all mineral land from the grant made to the railroad company; and, of course, the executive orders withdrawing the land from sale or entry did not affect lands not included in the grant. Moreover, the attention of the court in that case was especially directed to the case of Buttz *v.* Railroad Co., *supra;* and in reference to that case the court, at page 636,
42 observed: "On one side, it is said that that case construes the sixth section of the act of 1864 as excluding the possibility of any right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side, it is contended that the only point necessary to be determined, and the only one judicially determined, in that case, was that the defendant could not initiate a pre-emption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the Buttz case involved no inquiry as to the respective rights of the railroad company under the act of 1864, and of parties making applications in due form, prior to the definite location of its road, to purchase lands as mineral lands that were within the exterior lines of its general route." We therefore conclude, from the language above quoted, that it was not the intention of the court in that case to overrule the decision in the Buttz case, or subsequent cases announcing the same doctrine.

It is also contended by the respondent that the withdrawal order above set forth did not, in any event, exclude the lands attempted to be withdrawn from the operation of the homestead law, for the reason that the local land officers were directed to withhold all the odd-numbered sections from sale or entry simply; but we think the word "entry" covers homestead applications, as well as what is

generally known as a private entry of lands after the close of public sales. The word "entry" means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the appropriate land office." See Denny *v.* Dodson 32 Fed. 899, 910; Chotard *v.* Pope, 12 Wheat. 586.

It is also claimed by the respondent that he had a right to enter the land in controversy, under the homestead laws, by virtue of the act of Congress of May 14, 1880 (21 Stat. 140), which provides that the rights of homestead settlers, like those of pre-emptioners, relate back to the time of settlement. That statute was invoked in Maddox *v.* Burnham, 156 U. S. 544, but the court there held that mere occupation of the public land for the purpose of subsequently entering the same as a homestead, but without actually making such entry until after the lands were withdrawn by order of the Secretary of the Interior, gave the occupant no right thereafter to obtain the title to the land under the homestead laws. For the reasons indicated, the judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for the appellant for the possession of the lands described in the complaint.

ANDERS, *J.*

We concur:
GORDON, *C. J.*
REAVIS, *J.*
DUNBAR, *J.*

43 In the Supreme Court of the State of Washington.

THURSDAY, *July* 5, 1900.

NORTHERN PACIFIC RAILWAY COMPANY, Appellant,
vs.
PETER NELSON and HENRY NELSON, Respondents. } Judgment.

This cause having been heretofore submitted to the court on the transcript of the record of the superior court of Kittitas county and upon the argument of counsel and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing it is now on this 5th day of July A. D. 1900 on motion of Stephens & Bunn of counsel for appellant considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby reversed with costs, and that the said Northern Pacific Railway Company have and recover of and from the said Peter Nelson and Henry Nelson the costs of this action taxed and allowed at seventy-seven and $\frac{15}{100}$ dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceeding in accordance with the opinion herein filed.

44 Copy.

In the Supreme Court of the United States, December Term, 1900.

PETER NELSON and HENRY NELSON, Petitioners and Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Respondent and Defendant in Error.

Assignment of Errors.

Comes now said petitioners and plaintiffs in error, Peter Nelson and Henry Nelson by James Hamilton Lewis, their attorney, and for assignment of errors, say that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:—

I.

That the supreme court of the State of Washington committed error in construing the act of Congress of July 2d 1864 and particularly sections three and six of the said act in holding and deciding that by the construction of the said act the Northern Pacific Railway Company was entitled to that certain land situated in the county of Kittitas, State of Washington, known as the southeast quarter of section twenty-seven (27), in township twenty (20) north, range fourteen (14) east, W. M., because and for that

45 II.

And the said supreme court committed error in construing the said act of Congress against the interest, the rights and the claim of petitioners and plaintiffs in error, said Peter Nelson and Henry Nelson, in deciding and holding that the said act should be and is construed to mean that the said claim of the said Nelsons was not well founded and their entry upon the said land did not attach because by construction of the said act of Congress the said entry and claim of the said Nelsons for that to wit, by *the* section three of the act of Congress dated July 2d, 1864, granted all lands designated by said company in their selections notified to the Secretary of the Interior or General Land Office irrespective of the date of the filing of the map of definite route or general location; that as the said petitioners had taken the said land in question subsequent to the date of the respondents' selections though before any filing of the map of definite location or any announcement by said company respondent of its choice in any other way than by communication to the Land Department in letter still the claim of the petitioners did not attach though prior in date to the filing of said map by respondents and on land not theretofore located.

46 Wherefore the said Peter Nelson and Henry Nelson pray that the order and decision herein and in the premises of the supreme court of the State of Washington be reversed and set aside and the said court be directed to enter an order directing the said judgment to be so set aside and judgment entered affirming the decision of the superior court of the State of Washington or reversing

the said cause for further proceedings consistent with the claim and contention of the said petitioners and plaintiffs in error.

JAS. HAMILTON LEWIS,
Attorney for Petitioners and Plaintiffs in Error.

47 In the Supreme Court of the United States, December Term, 1900.

PETER NELSON and HENRY NELSON, Petitioners and Plaintiffs in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY, Respondent and Defendant in Error.

Know all men by these presents: That we, Peter Nelson and Henry Nelson of the county of Kittitas, State of Washington, as principals and John Nelson and Frank Bossong, as sureties, are held and firmly bound unto the above-named Northern Pacific Railway Company in the sum of two hundred and fifty dollars ($250), to be paid to the said Northern Pacific Railway Company, for the payment of which well and truly to be made, we bind ourselves and each of us our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the 12th day of September in the year of our Lord 1900.

Whereas, the above-named Peter Nelson and Henry Nelson have prosecuted their writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit, given by the judges of the supreme court of the State of Washington for the State of Washington,

Now, therefore, the condition of this obligation is such, that if the said above-named Peter Nelson and Henry Nelson shall prosecute their said appeal and writ of error to effect and answer all damages and costs if they fail to make such writ of error and appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PETER NELSON.
HENRY NELSON.
JOHN NELSON.
FRANK BOSSONG.

48 Sealed and delivered and acknowledged this 12th day of September A. D. 1900 before me.

J. E. FROST,
Notary Public.

[SEAL.]

Residence, Ellensburg, Wash.

This bond approved by
R. O. DUNBAR,
Chief Justice.

Approved:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

STATE OF WASHINGTON, } ss:
County of Kittitas, }

John Nelson and Frank Bossong being each separately sworn on oath says each for himself and not one for the other, I am one of the sureties who signed the within bond; I am a citizen and resident of Kittitas county in the State of Washington. I am not a sheriff, attorney-at-law or officer of any court. I am worth the sum of two hundred and fifty dollars ($250) in property within the State of Washington over and above my just debts and liabilities, exclusive of property exempt from execution.

JOHN NELSON.
FRANK BOSSONG.

Subscribed and sworn to before me this 12th day of September, A. D. 1900.

J. E. FROST,
Notary Public.

[SEAL.]

Residing at Ellensburg, Kittitas county, Washington.

Indorsed: Filed Sep. 17 1900. C. S. Reinhart, clerk.

49 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Northern Pacific Railway Company, appellant, and Peter Nelson and Henry Nelson, respondents, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said respondents, as by their complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of October, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 3000. Filed Oct. 29, 1900. C. S. Reinhart, clerk.

51 In the Supreme Court of the State of Washington.

PETER NELSON and HENRY NELSON, Plaintiffs in Error,
v.
NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error. } No. 3000.

I, C. S. Reinhart, clerk of the supreme court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above-entitled cause, and that in pursuance of the writ of error heretofore filed in this court from the United States Supreme Court, I herewith transmit such transcript together with the original writ of error, a copy of the assignment of errors and a copy of the bond on appeal to the United States Supreme Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 24th day of January, 1901.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Endorsed on cover: File No. 18,044. Washington supreme court. Term No. 44. Peter Nelson and Henry Nelson, plaintiffs in error, *vs.* The Northern Pacific Railway Company. Filed February 4th, 1901.